No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Court should overrule *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

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INTEREST OF *AMICUS CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists.

Atlantic Legal's directors and advisors are familiar with the pervasive federal regulations and agency interpretation of those regulations have on businesses, professions, voluntary organizations, and individuals. They are frequently called upon in their business, professional and personal lives to gauge the impact of federal regulations on their lives and the lives of themselves, their family members, their employers, employees and colleagues. Many of Atlantic Legal's directors and

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[1] The parties have consented to the filing of this brief, which consents have been lodged with the Court

Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary or other contribution to the preparation or submission of this brief.

advisers have wide experience interpreting federal statutes and regulations.

The Foundation has an interest in ensuring that agencies do not overreach their constitutionally limited roles and regulate only in a lawful, fair and clear manner. The Foundation also has an interest in seeing that courts perform their constitutional function of limiting the power of the other branches; to do so the courts should not defer to agencies when deference is not due.

To this end, Atlantic Legal Foundation files *amicus* briefs in this Court in cases involving issues of agency overreach and judicial deference, most recently in *United States Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016).

INTRODUCTION AND SUMMARY OF ARGUMENT

"The administrative state 'wields vast power and touches almost every aspect of daily life.'" *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quoting *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). Virtually all persons, natural and legal, from infant to pensioner, from individual proprietor to Fortune 50 company, from subsistence farmer to cutting nano technology entrepreneur, is untouched by federal regulation. Federal regulations affect us, literally, from "cradle to grave.:" See Consumer Products Safety Commission regulations, 16 C.F.R. Part 1218 (Safety Standard for Bassinets and Cradles) and

Federal Trade Commission regulations, 16 C.F.R. Part 453 (Funeral Industry Practices).

Regulated persons and entities are affected when an agency reinterprets its regulations in a manner that changes settled understandings without using the mechanisms and safeguards provided in the Administrative Procedure Act (APA) – principally notice-and-comment rulemaking – that provides a check on regulatory overreach by requiring public participation and the development of an administrative record that facilitates judicial scrutiny of agency action.

The principles of deference adopted in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and in *Auer* v. *Robbins*, 519 U.S. 452 (1997) (hereafter "*Auer* deference") has immense impact on individuals and corporations who are part of the "regulated community" – almost all individuals, companies, associations who are subject to ever-growing federal regulation.

"The canonical formulation of *Auer* deference is that [the Court] will enforce an agency's interpretation of its own rules unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part, dissenting in part). If a regulation has multiple plausible readings, an agency's preferred interpretaion, rather than the most logical, the one with the best linguistic meaning, or most legally relevant, will prevail. An executive branch agency will have displaced the judiciary's role in scrutinizing

executive agency claims of jurisdiction and authority. *Id.* The Court "offered no justification whatever" when it adopted this interpretive rule, *id.*, and cited no statute, constitutional provision, or precedent, and advanced no logic to support this doctrine. *Id.*

The *Auer* doctrine vests in administrative agencies expansive lawmaking authority. The continued application of *Seminole Rock* and *Auer*, gives the executive branch opportunities to usurp judicial and legislative powers that the Constitution gives to other branches. The *Auer* doctrine also is an improper delegation of authority, creates incentives for agencies to adopt vague regulations, and disrupts reasonable expectations of regulated parties. *See Garco Constr., Inc. v. Speer*, 138 S. Ct. 1052 (2018) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari); *Decker*, 568 U.S. at 615 (Roberts, C.J., concurring); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210-11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211-13 (Scalia, J., concurring in the judgment); *id.* at 1213-25 (Thomas, J., concurring in the judgment).

When agencies adopt regulations through notice-and-comment rulemaking, regulated persons have an opportunity to shape the regulatory environment and ameliorate the burdens of excessive regulation.

Auer deference does not assist a court in understanding a regulation's meaning:

fundamentally this is a legal question that courts are best equipped to answer and, additionally, it permits agencies to effect their policy preferences without affording the regulated community the protections of the "notice and comment" requirements of the APA.

The APA imposes safeguards on agencies' exercise of their lawmaking authority. Notice-and-comment rulemaking requires notice, public participation, and agency accountability.[2] *Auer* deference subverts this arrangement by allowing an agency to engage in "interpretation" that substantively changes the regulation (and thus the underlying statute), and binds the regulated public and the courts, without the APA's procedural safeguards.

Further, *Auer* deference conflicts with the plain language of Section 706 of the APA, which requires "the reviewing court [to] . . . determine the meaning or applicability of the terms of an agency action." 5 U.S.C. §706. Section 706 of the APA provides that "the reviewing court"—not the agency—"shall * * *

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[2] Congress enacted the APA the year after *Seminole Rock* was decided. The APA's "safeguards * * * against arbitrary official encroachment on private rights" serve "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 644 (1950).

determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. An "agency action," in turn, "includes the whole or a part of an agency rule." *Id.* § 551(13). Section 706 similarly allocates to Article III courts the responsibility to "decide all relevant questions of law." *Id.* Section 706 "contemplates that courts, not agencies, will authoritatively resolve ambiguities in * * * regulations." *Perez*, 135 S. Ct. at 1211 (Scalia, J.).

The *Auer* doctrine of deference to an agency's interpretation of its own regulations violates fundamental separation of powers principles. It exacerbates the problem of delegation of legislative powers to unelected executive branch officials and bureaucrats. It negates and displaces the judicial authority to interpret the laws, an authority that has been recognized since the very early days of our constitutional republic. "*Auer* is . . . a dangerous permission slip for the arrogation of power" *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 620-21 (2013) (Scalia, J., concurring in part and dissenting in part) (citing *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 67-68 (2011) (Scalia, J., concurring)). "[A] core objective of the [tripartite] constitutional structure was to ensure meaningful separation of lawmaking from the exposition of a law's meaning in particular fact situations." John F. Manning, "Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules," 96 Colum. L. Rev. 612, 674-75 (1996)); accord *Perez*, 135 S. Ct. at 1218- 1219 (Thomas, J.).

Congress established procedural and substantive safeguards in the APA to protect the public from irregular agency lawmaking, but *Seminole Rock* and *Auer* license agencies to circumvent those safeguards when they interpret their own regulations. The APA also provides the public a right to participate in the rulemaking process. See 5 U.S.C. § 553(c). An agency must implement "consideration of the relevant matter presented" to it by the public, before adopting a final rule. *Id.* "[N]otions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979).

Auer deference "allow[s] agencies to make binding rules unhampered by notice-and-comment procedures." *Perez*, 135 S. Ct. at 1212 (Scalia, J.). It enables "the same agency that promulgated a regulation to 'change the meaning' of that regulation 'at [its] discretion,'" without the notice, public participation, and agency accountability that the APA requires. *Garco*, 138 S. Ct. 1052-1053 (2018) (Thomas, J., dissenting from the denial of certiorari).

Auer deference also encourages agencies to adopt vague regulations that they can later interpret however they see fit. This limits the regulated community's ability to conform conduct to law and "creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat[ing] the

notice and predictability purposes of rulemaking.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142,158 (quoting *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring)).

It also impedes an aggrieved party's ability to challenge a regulation. Those adversely affected by the rule may challenge it on a variety of grounds, including that the agency failed to follow the required process or that the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). But lack of a rule-making record makes it difficult, if not impossible, to prove the elements of a challenge to an "interpretation" that is, effectively, a substantial amendment of the regulation.

Auer deference also encourages agencies to adopt vague rules. "It is perfectly understandable * * * for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting). Justice Scalia described the problem in *Perez*:

> Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain. To

> expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment. The APA does not remotely contemplate this regime.

135 S. Ct. at 1212 (Scalia, J.).

Not only do vague regulations give the agency flexibility, they are an impediment to the ability of regulated entities to conform their conduct to the requirements of the law and to plan their business or personal lives.

ARGUMENT

I. *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.* Should Be Overruled.

Seminole Rock and *Auer* deference should be overruled because it cannot be reconciled with the text of the APA, it undermines the APA's principal procedural safeguard, it contravenes separation of powers principles, and it cannot be justified by policy considerations.

A. *Seminole Rock* and *Auer* Contravene the APA.

The APA expressly provides that "the reviewing court shall ... determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The APA thus "contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations." *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring) and makes clear that it is "the responsibility of the court to decide whether the law means what the agency says it means." *Id.*

Auer deference cannot be reconciled with the text of the APA. In *Auer*, the Court "[n]ever mention[ed] § 706's directive." *Id.* Instead, the Court simply relied on *Seminole Rock*, even though that case was decided before Congress enacted the APA. See *id.*

B. *Seminole Rock* And *Auer* Violate Separation of Powers Principles.

Seminole Rock and *Auer* deference should be overruled because it violates separation of powers principles central to the structure of our federal

government. The central critique of the *Auer* doctrine is its concentration of power to both make and interpret the law into a single branch of government. *Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 564 U.S. 68 (2011) (Scalia, J., concurring).

Auer "represents a transfer of judicial power to the Executive Branch." *Perez*, 135S. Ct. at 1217 (Thomas, J.). The Constitution vests the judicial power of the United States in the judiciary, which is to exercise "independent judgment." *Id.* But "the agency is * * *not properly constituted to exercise the judicial power under the Constitution, [so] the transfer of interpretive judgment raises serious separation-of-powers concerns." *Id.* at 1219-1220. See also *Garco Constr., Inc.*, 138 S.Ct. at 1052-1053 (Thomas, J.) ("[*Auer*] undermines'the judicial check on the political branches' by ceding the courts' authority to independently interpret and apply legal texts.").

By giving "controlling weight" to an agency's interpretation of its own ambiguous regulation, the Court has ceded the judicial function to the Executive. This violates a fundamental principle of separation of powers – that the power to write a law and the power to interpret it cannot rest in the same hands." *Decker*, 568 U.S. at 619 (Scalia, J., concurring in part and dissenting in part). Separation of the powers of government is a foundational principle of our constitutional system. Fear of concentrated power animated the structural separation of power protections in the architecture of the federal government. See James Madison,

Federalist 51, THE FEDERALIST PAPERS 318 (Charles R. Kesler and Clinton Rossiter, eds., 2003)Alexander Hamilton, Federalist 9, THE FEDERALIST PAPERS, *supra at* 67; see also *INS v. Chadha*, 462 U.S. 919, 951 (1983). *Auer* deference "undermines 'the judicial "check" on the political branches' by ceding the courts' authority to independently interpret and apply legal texts." *Garco Constr., Inc.*, 138 S. Ct. at 1052 (Thomas, J., dissenting).[3]

("[W]hen an agency promulgates an imprecise rule, it leaves to itself the implementation of that rule, and thus the initial determination of the rule's meaning . . . . It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.") (internal citations omitted). This concentration of power invades what has for over two centuries been "emphatically the province and duty of the judicial department[:] to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also *Decker*, 568 U.S. at 616 (Scalia, J., concurring in part and dissenting in part) ("For

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[3] This problem is especially acute in cases such as this in which the agency's interpretation is announced in an adversarial proceeding in which the agency itself is an interested and contending party. "This "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government," *Garco Constr., Inc.*, 138 S. Ct. at 1053 (Thomas, J., dissenting), and results in "precisely the abuse[] that the Framers sought to prevent." *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring)

decades, and for no good reason, we have been giving agencies the authority to say what their rules mean.").

C. *Auer* Undermines the APA's Important Safeguards of the Public Interest.

The APA requires that agencies engage in deliberative lawmaking.

Notice-and-comment rulemaking is grounded in "notions of fairness" because it promotes "informed administrative decisionmaking" by allowing an agency to enact regulations "only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979). Notice-and-comment rulemaking provides regulated entities with a vital opportunity to help shape the administrative decisions that affect them, and they have the opportunity to present evidence and make policy arguments to support their position on proposed regulations. Notice-and-comment (and the agency's response to comments) encourage such deliberative rulemaking, or at least afford the public (and a court) to ferret out arbitrary and capricious agency action.[4]

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[4] As Justice Scalia explained, abandoning *Seminole Rock*/*Auer* deference would still leave "[t]he agency . . . free to interpret its own regulations with or without notice and comment; but *courts will decide* – with no deference to the agency – whether that interpretation is correct." *Perez*, 135 S. Ct. at 1213 (Scalia, J., concurring in the judgment) (emphasis added).

Auer eviscerates rates a fundamental protection of the APA by allowing agencies to resolve ambiguity[5] by reinterpreting regulations instead of using the APA's noticeand-comment requirements to amend them. See *Perez*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring) ("By giving [regulations] *Auer* deference, we do more than allow the agency to make binding regulations without notice and comment. Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, givingthem deference allows the agency to control the extent of its notice-and-comment-free domain.").

The requirement of notice-andcomment rulemaking (see 5 U.S.C. § 553) is among the APA's chief "safeguards." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 644 (1950).

D. *Auer* Encourages Agencies to Promulgate Ambiguous Regulations

A second often articulated critique of the *Auer* doctrine is that it creates perverse incentives. *Auer* deference effectively exempts agencies from the APA's notice-and-comment requirements, and leaves agencies free to promulgate ambiguous regulations and later interpret them, without judicial scrutiny of the agency. *See Decker*, 133 S. Ct. at 1341 (Scalia, J., dissenting in relevant part) (internal quotation marks omitted) ("Then the power to prescribe is

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[5] Given the plasticity of the English language, it is very easy to "find" or create ambiguity.

augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a flexibility that will enable clarification with retroactive effect."). It leaves them free "to control the extent of [their] notice-and-comment-free domain." *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment). And it provides them the opportunity "[t]o expand this domain, . . . [by] writ[ing] substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment." *Id.*

[D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government. *Talk Am.*, 564 U.S. at 69 (Scalia, J., concurring)..

> It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process. Nonetheless, agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law.

Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

Some agencies indeed have promulgated ambiguous regulations with the purpose of expanding their jurisdiction. See, *e.g.*, *Talk Am.*, 564 U.S. at 69 (Scalia, J., concurring) (noting that the Federal Communications Commission "has repeatedly been rebuked in its attempts to expand the [Telecommunications Act of 1996] beyond its text, and has repeatedly sought new means to the same ends."). The U.S. Army Corps of Engineers (Corps) has a history of promulgating regulations expanding its jurisdiction See *Rapanos* v. *United States*, 547 U.S. 715, 725 (2006) (plurality op.).

Agency actions that proceed without notice-and-comment put the regulated community at risk. If an agency advances an interpretation of its regulations that requires the regulated community to take, or refrain from taking, an action, that interpretation has the force of law on the matter. The regulated community must either conform to the interpretation or risk an enforcement action based on alleged non-compliance.[4] As Justice Scalia explained:

> [I]f an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law.

Perez, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

Auer deference also rests on faulty assumptions and reasoning. Deference to administrative agencies is premised on their presumed subject matter expertise. However, although agencies may be "better equipped than the courts" to make technically-based policy decisions, an agency "is no better equipped to read legal texts." *Garco Constr., Inc.* 138 S. Ct. at 1053 (Thomas, J.); see also Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 397 (1986). The interpretation of a regulation is a legal function, requiring the ability to analyze and interpret the text of the regulation text and other pertinent material. Agencies have no greater capacity than courts – we submit they have less experience and training – to discharge this task. *Auer* deference gives the agency's interpretation the force of law even if policy considerations, rather than legal interpretation, dictated the result.

While agencies often possess technical expertise, Congress has prescribed the mechanism by which agencies can bring their expertise to bear when promulgating regulations – the iterative notice-and-comment process. The agency likely does not have a monopoly of such expertise, and Congress has provided that notice-and-comment rulemaking be used so that other persons with expertise and different perspectives can weigh in. *Auer* deference frustrates that statutory requirement.

Auer deference is especially problematic because it gives agencies greater latitude to issue binding rules than does the Court's deference doctrine under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[6] When Congress delegates authority to issue binding regulations through notice-and-comment rulemaking, deference to the agency's interpretation of a statute is dependent on its adherence to that procedure.

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[6] There is a lively debate whether "regulatory science" is the "best available science" (see, *e.g.*, A. Alan Moghissi, *et al.*,. Innovation in Regulatory Science: Evolution of a New Scientific Discipline, 16 Technology and Innovation 155, doi:10.3727/194982414X14096821477027 (2014), Bryce E Esch, *et al.*, Using Best Available Science Information: Determining Best and Available, 116 Journal of Forestry 473 (September 2018), https://doi.org/10.1093/jofore/fvy037; Natalie Lowell and Ryan P.Kelly, Evaluating Agency Use of "Best Available Science" Under The United States Endangered Species Act, 196 Biological Conservation 53 (April 2016), https://doi.org/10.1016/j.biocon.2016.02.003.), and whether *Chevron* deference is itself doctrinally sound. But that is an issue for another day, andn is not tto be decided in this case.

CONCLUSION

The Court should grant the writ and reverse the judgment entered below.

Respectfully submitted,

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